



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2004

Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2004-9381

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 212296.

The Texas Education Agency (the "agency") received three requests for information concerning Wilmer-Hutchins Independent School District (the "district.") Specifically, the requestors ask for the letter of complaint received by the agency concerning the district, correspondence between the agency and the district concerning the \$500,000 time warrant issued May 24, 2004, and a preliminary report of the agency's findings regarding the district's management practices. You claim that the requested information is excepted from disclosure under sections 552.108 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We begin by addressing section 552.116 of the Government Code, which provides as follows:

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. We note you have not provided us with any explanation of how or why section 552.116 would be applicable to any of the submitted information. We also note that section 552.116 is a discretionary exception that may be waived. *See* Gov't Code § 552.007; Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). Because you have not provided us with any information that would enable us to conclude that section 552.116 is applicable, we find that the submitted information is not excepted from disclosure under section 552.116 and may not be withheld on that basis.

Next, you raise section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. Gov't Code § 552.108(a)(1). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates that the information relates to the pending case and provides this office with a representation from the law enforcement entity that the law enforcement agency wishes to withhold the information.

In this case, you indicate that the information at issue is related to an investigation being conducted by the Criminal District Attorney for Dallas County, Texas (the “district attorney”), and you have submitted a letter from the district attorney. In that letter, the district attorney requests that the agency not release information transmitted by the agency to the district attorney concerning the district, stating that such information is related to an ongoing criminal investigation. Based upon your representations and the representations of the district attorney, we agree that section 552.108(a)(1) is applicable. Accordingly, to the extent the submitted information was transmitted to the district attorney, we find the agency may withhold such information pursuant to section 552.108(a)(1) of the Government Code. However, to the extent the submitted information was not transmitted to the district attorney, we find that such information is not excepted under section 552.108 and may not be withheld on that basis.

In the event the submitted records are not excepted under section 552.108, we note that the submitted documents contain social security numbers that may be excepted from public disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by other statutes. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the agency pursuant to any provision of law enacted on or after October 1, 1990.

We further note that, in the event the submitted information is not excepted under section 552.108, a Texas driver’s license number in the submitted documents is excepted under section 552.130 of the Government Code. Section 552.130 excepts information relating to a Texas motor vehicle driver’s license and information relating to a Texas motor vehicle title or registration. Gov’t Code § 552.130. Thus, the agency must withhold the Texas driver’s license number we have marked under section 552.130 of the Government Code.

Finally, in the event the submitted records are not excepted under section 552.108, we note that account numbers in the submitted documents are excepted under section 552.136 of the Government Code, which provides in relevant part:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. Thus, in the event the submitted records are not excepted under section 552.108, the agency must withhold the account number information we have marked pursuant to section 552.136 of the Government Code.

In summary, to the extent the submitted information consists of records that were transferred to the district attorney by the agency, we determine that the agency may withhold such records pursuant to section 552.108(a)(1) of the Government Code. However, in the event that the submitted information has not been transmitted to the district attorney, we make the following determination: the submitted information must be released to the requestors, with the exceptions that (1) a driver’s license number we have marked must be withheld under section 552.130 of the Government Code; (2) account number information we have marked must be withheld under section 552.136 of the Government Code; and (3) social security numbers may be excepted under section 552.101 of the Government Code in conjunction with federal law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 212296

Enc: Submitted documents

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